a stranger. The Court ignored the real ground upon which the plaintiff's claim rested; *i. e.*, the breach of a duty imposed by law. It is submitted that the case falls within the exception to the general rule as to liability of manufacturers, which exists in the case of an article "intended to preserve, destroy or affect human life." In the case cited above,[9] which so held, it is said: "The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs, irrespective of any question of privity between the parties."

Liability of Stockholders upon Unpaid Stock Subscription.

The liability of a stockholder upon his unpaid stock subscription to the corporate creditor, has always been worked out through the fictional person of the corporate entity, on the ground that the entity is the debtor of the corporate creditor. The problem has always been to devise some theory by which to prevent the stockholder from asserting rights, which are perfectly valid against the entity, in order to give the corporate creditor a greater right against the stockholder than that possessed by the entity itself. Two theories have been advanced. The "trust fund" doctrine regards the capital stock as a trust fund for the benefit of the creditors. When the stockholder attempts to escape liability, by settling up claims which are good as against the entity, as for example, a set-off or a release, but which would prevent any remedy to the creditor, he finds that the claims are no longer mutual, and cannot be set up against each other. This theory has been severely criticised. It is admitted that in the strict sense of the word there is no trust; that it is a misnomer; and that what is meant, is merely administration of assets in equity.[1] If that is so, the "trust fund" theory does not explain why the creditor should be given a greater right against the stockholder than that possessed by the entity. The other theory gives relief on the ground of fraud, in an action of deceit. It is said that the creditor is presumed to rely upon the stated capital of the entity, as security, and that when stock is issued, purporting to be fully paid up, when, in fact, it is not, he is deceived. The stockholder who accepts such stock is guilty of a misrepresentation, because he holds out the entity as possessing its capital stock fully paid up, when

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[1] *Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S. 371 (1893); *McDonald* v. *Williams*, 174 U. S. 397 (1899); *O'Brear Jewelry Co.* v. *Volfer & Co.*, 106 Ala. 205 (1894); Cook on Corporations (5th Ed.).

it is not and is compelled to make good his representation,[2] when any person advances credit to the entity in reliance thereon. But if credit is advanced prior to the issue of the stock, or with notice that it was not in fact paid up, there could be no reliance,[2] and, therefore, no recovery on the ground of fraud. The entity cannot recover, because of the release. But this theory does not explain why a stockholder is not allowed a set-off of a valid claim against the entity, when the stock is not issued as fully paid up with a release from further payment. Because a creditor has notice that a balance of the stock subscription is still unpaid, subject to call, he is not prevented from compelling the stockholder to pay it, and the authorities agree that no set-off is allowed.[3] Therefore, the fraud theory is also unsatisfactory, and we have no theory which does account for the liability of the stockholder upon his unpaid stock subscription, when we regard the entity as the debtor of the corporate creditor. Justice to the creditor demands the enforcement of this liability. There is a consistent solution for it.

To-day, when a certain solution of a corporate problem is demanded by justice, and it cannot be reached by working out the problem through the fictional entity, some courts absolutely disregard [4] the entity; and instead, consider the stockholders as a group of associates with joint assets and liabilities.[4] Such decisions are notices to the entity to quit. The solution that has been reached in the problem before us, demands that the entity be disregarded. It is a fiction, and as such implies that the truth is otherwise. It is merely a substitute for a real explanation, and can have no permanent place in a sound legal system.[5] The stockholders, not the entity owe the creditor.[6] At common law they were liable to him without limit.[7] The limitation [8] is a modern doctrine.[9] If we regard the entity as the debtor, it is correct conclusion. A creditor can only look to the

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[2] *Hospes* v. *Northwestern Mfg. Co.*, 48 Minn. 174 (1892).

[3] *Bickley* v. *Schlag*, 46 N. J. Eq. 533 (1890).

[4] *United States* v. *Milwaukee Refrig. Transit Co.*, 142 Fed. 247 (1905); *Att'y. Gen.* v. *Standard Oil Co.*, 49 Ohio St. 137 (1892); *Northern Securities Co.* v. *U. S.*, 193 U. S. 199 (1903); *Mobile* v. *Watson*, 116 U. S. 289 (1886).

[5] See article by Mr. George Wharton Pepper entitled, "A Brief Introduction to the Study of the Law of Associations," 49 Am. Law Reg. (N. S.) 255, pp. 258-259.

[6] See same article, pp. 266-267.

[7] See article by Mr. Samuel Williston entitled, "History of the Law of Business Corporations before 1800," 2 Har. Law Rev. 105, 148, pp. 160-162. Also *Dr. Salmon* v. *The Hansborough Company*, Ch. Cas. 294; 6 Vin. Abr. 310 (1641); *Hume* v. *Windyard and Wando Canal Co.*, 1 Car. L. J. 217 (1826).

[8] *Carr* v. *Inglebart*, 3 Ohio St. 457 (1854).

[9] See article by Mr. George Wharton Pepper entitled, "Irregular Associations," 52 Am. Law Reg. (N. S.) 409, 504, 576, pp. 432-435.

assets of his debtor for payment.[10] But this limitation of the liability has not changed its nature. It is that of co-debtor, and until the limit is reached the problem is the same as though no limit were imposed.[6] No one would contend that co-debtors could defeat the claims of their common creditor by an agreement *inter se,* releasing each other from liability, nor would it be possible to conceive of co-debtors setting off claims, which they had against each other, when sued by the common creditor. Such claims can only be asserted when the rights *inter se* are determined, and can have nothing to do with the right of the common creditor against the individual associate. The interposition of the entity as debtor, has merely served to confuse these two distinct sets of rights. This view readily explains why a stockholder upon a subsequent issue of stock, is not liable to a prior creditor, because in no sense of the word did he contract the debt. But notice on the part of the creditor, that stock was not, in fact, paid up, though issued as such, should not necessarily bar him, if we regard the associates as co-debtors, and it would not be necessary to pass a statute to accomplish such a desired result, nor to resort to grounds of public policy in order to construe a statute to intend such.[11] Neither single debtors nor co-debtors can restrict their liability to certain specific assets, by merely hanging up a notice of their intention. There must be an express stipulation to that effect in the contract with the creditor.[12]

Since stockholders are co-debtors, after judgment is obtained against the group, each is liable severally for the whole debt—within the limit of his restricted liability—and therefore a creditor need not join all the associates.[15] But the principle of marshalling requires that he first exhaust the joint assets, by a return of *nulla bona,* before proceeding against the individual associate. In order to prevent multiplicity of suits, and settle the right *inter se* in the same action, those associates who are sued, have the right to file a bill to have all the other stockholders joined.[15] If the creditor is also an associate, he need only contribute his own pro rata share towards the payment of his own claim; [13] and should not be compelled to pay his own stock balance in full, as a condition precedent to suit.[14]

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[10] *In re Sheffield and South Yorkshire Permanent Bld. Soc.,* 22 Q. B. D. 476 (1889).

[11] *Easton Nat. Bank* v. *Am. Brick and Tile Co.,* 64 Atl. (N. J.) 917 (1906).

[12] *Greenwood's Case,* 3 De G. M. & G. 459 (1854); *Hess* v. *Wertz,* 4 S. & R. 356 (1818).

[13] *Bissel* v. *Kty.,* 15 Fed. 353 (1882); *Wilson* v. *Kiesel,* 9 Utah, 397 (1894).

[14] Cook on Corporations (5th Ed.), Sec. 205, p. 405; *cf. Weber* v. *Fickey,* 47 Md. 196 (1877).

[15] *Hatch* v. *Dana,* 101 U. S. 205 (1879).

And since as a creditor he need not join all his associates, the whole claim of the associate will be apportioned among those before the court, the creditor-associate contributing his own proportion. *Blood* v. *La Serena Land and Water Co.*, 89 Pac. (Cal.), 1090 (1907).

It is submitted that such a decision cannot be satisfactorily explained, if the entity is regarded as the debtor, unless some other theory than the two above mentioned, is discovered. If we regard the associates as the debtors, the case needs no explanation. The same result has been reached in cases where the associates are admitted to be co-debtors—viz. partners.[16]

MUNICIPAL CORPORATIONS.

Right of City to Dispose of Surplus Electric Power for Private Purposes.

The general form of government in the United States, with its three-fold division of powers, exercised by the legislative, the executive, and the judicial departments, early influenced the courts in favor of the view that the functions of each department, were, except, perhaps in extreme situations, to be exercised independent of the others and free from interference by them, and that there existed, therefore, a point beyond which the judicial department could not go in regulating the acts of either the legislative or the executive branches.[1]

This rule has been held applicable to the acts of municipal corporations, which are but sub-divisions of the sovereign government, with powers delegated by the Legislature, and hence the Supreme Court of New York refused to reverse, on *certiorari,* the proceedings of a municipal corporation relating to certain street improvements, where it appeared that it had acted within the scope of the authority conferred by a statute of the Legislature, and had complied with the forms which the statute required.[2]

And this same Court held that "Courts of Equity have no general supervisory power over the government of municipal corporations or over acts and proceedings of their governing bodies . . . . except where it is shown that the rights of an individual have been injured or menaced in a matter falling under some recognized head of equity, and which it is the peculiar province of a court of equity to prevent or redress." [3]

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[16] *In re Professional Life Assurance Co.*, L. R. 3 Eq. Cas. 668 (1867).

[1] *Marbury* v. *Madison,* 1 Cranch, U. S. 137 (1803); *Rees* v. *City of Watertown,* 19 Wall. U. S. 107 (1873).

[2] *Ex parte Mayor, &c. of Albany,* 19 Wend. N. Y. 277 (1840).

[3] *Phelps* v. *City of Watertown,* 61 Barb. N. Y. 121 (1871).